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ABSTRACT

The impact of Title VII of the 1964 Civil Rights Act on the mass media is the focus of this paper. The paper provides an overview of Title VII--noting that the wording of the act leaves the courts considerable discretion in determining what constitutes a violation--and separate discussions of the protection available to newsroom personnel in the areas of racial, religious, sex, and age discrimination. Among the questions addressed are the following: (1) Under what conditions may a mass medium pay a black less than a white or a woman less than a man? (2) What behavior on the part of media employers is illegal under Title VII? and (3) When would the protection of a related statute, the Age Discrimination in Employment Act, be available to a media employee? (HOD)

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JM journalism monographs

GEORGE E. STEVENS

Discrimination in the Newsroom: Title VII and the Journalist

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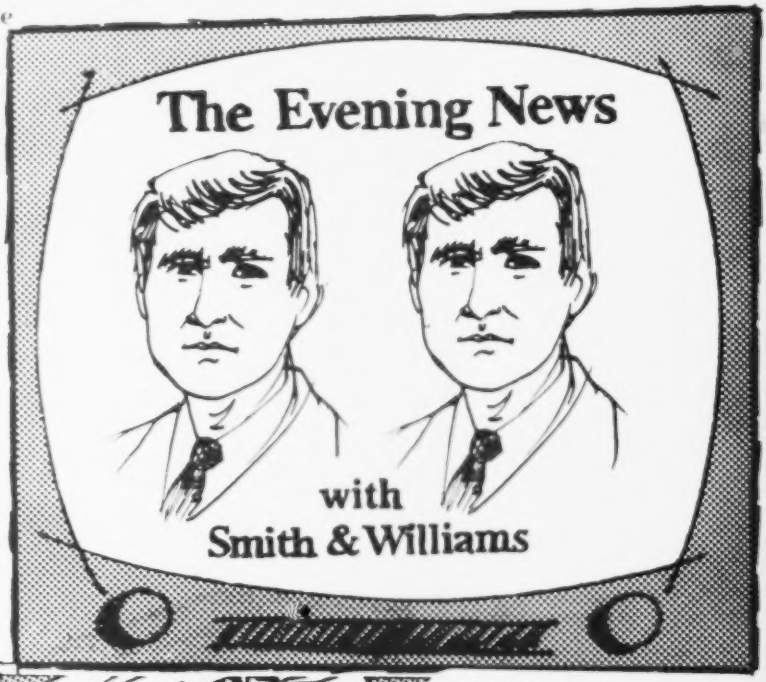

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In this, my final Number as editor, I want to thank the members of my Editorial Board for their assistance during the three years I have edited this series. I also want to thank the approximately 75 other persons who have read one or more manuscripts for me. The quality of the reviews I have received has been tremendous.

I also want to thank the authors of the manuscripts submitted to me. The patience of these persons has been excellent.

Walter Bunge, Director of the School of Journalism at Ohio State University, has provided encouragement as well as support for my editorship. I owe him a special thanks.

Finally, I want to thank the members of the Publications Committee for giving me the opportunity to edit *Journalism Monographs*.

Lee B. Becker
August 1985

GEORGE E. STEVENS

Discrimination in the Newsroom: Title VII and the Journalist

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Accepted for Publication May 1985

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ON JULY 2, 1964, CONGRESS passed "the most comprehensive piece of civil rights legislation ever proposed."[1] The 1964 Civil Rights Act attempted to provide all Americans with voting privileges, access to public accommodations, and equal educational and employment opportunities by targeting the elimination of discrimination as a "highest priority."[2]

A major concern of lawmakers was employment discrimination, especially that against black Americans. As Ohio Senator Stephen Young remarked:

> Job discrimination is extant in almost every area of employment and in every area of the country. It ranges. . . from patent absolute rejection to more subtle forms of invidious distinctions. Most frequently, it manifests itself through relegation to "traditional" positions and through discriminatory promotional practices. The maxim "last hired, first fired" is applicable to many minority groups, but most particularly Negroes. . . .[3]

Congress also recognized that similar problems were faced by a variety of other workers,[4] and under Title VII of the Civil Rights Act[5] it became an unlawful employment practice for an employer with 15 or more employees[6]

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate. . . with respect to. . . compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin, or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive. . . any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

For 20 years,[7] the impact of Title VII on American business concerns has been the subject of considerable scholarly attention. However, Title VII's impact on the mass media apparently has been unexplored, despite many questions of interest to print and electronic communicators and their employers. Under what conditions may a mass medium pay a black less than a white or a woman less than a man? What behavior on the part of media employers is illegal under Title VII? When would the protection of a related statute, the Age Discrimination in Employment Act,[8] be available to a media employee?

Such questions are discussed below. This monograph focuses on the protection available to newsroom personnel in the areas of race, religious, sex and age discrimination. It does not discuss in separate sections two other prohibited bases of adverse employment decisions: color and national origin. Color has no meaning apart from race or national origin,[9] and reported national origin lawsuits against the media have been few in number and usually have involved production workers (e.g., printers).[10]

Overview of Title VII

Discriminatory Treatment. In Title VII of the 1964 Civil Rights Act, "Congress chose neither to enumerate specific discriminatory practices, nor to elucidate *in extenso* the parameter of such nefarious activities."[11] Therefore, the determination of what constitutes a violation has been left to the courts, with guidance from the Equal Employment Opportunity Commission, an agency created by Title VII to interpret and administer the Act's employment-related provisions.[12] But as the wording of Title VII suggests, violations have not been limited to an employer's discriminatory hiring or firing or rates of pay. Media employees have argued with some success that their employers acted in a discriminatory manner by assigning them inferior office space,[13] forcing them to perform clerical duties not required of other similarly-situated employees,[14] and requiring them to enroll in speech and diction classes not mandatory for other workers.[15]

Moreover, courts have considerable discretion in deciding what remedy to impose if the plaintiff is successful. Among the remedies available are injunctions to stop a discriminatory practice, mandating the hiring or reinstatement of the plaintiff (with or without back pay), and "any other equitable relief that the court deems appropriate." Attorney fees also may be awarded to the winning party, but no case could be found in which such fees were awarded to a successful media defendant.[16]

It must be kept in mind, however, that *discrimination* is prohibited by Title VII, not mistreatment of employees in a nondiscriminatory manner. "Title VII is not a shield against harsh treatment at the workplace."[17] So it is not a violation of Title VII when an employer pays low salaries to all

newsroom employees,[18] provides all editors with inadequate office space and supplies,[19] neutrally enforces a prohibition relating to the employment of "close relatives" on the same magazine,[20] or even requires all secretaries (regardless of sex) to make coffee for their supervisors.[21]

The Prima Facie Case. To establish a prima facie case of disparate treatment, the plaintiff must show by a preponderance of evidence that he or she belongs to a class protected by Title VII, that the defendant treated him or her differently from other similarly-situated persons who are not members of the protected class, and that one or more adverse employment decisions or conditions resulted from that treatment. If the dispute involves a failure to hire or promote, the complaining party must demonstrate that he or she applied for an available position and was rejected despite being qualified.

If a plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse decision or action. The plaintiff then must show that the explanation offered was merely a "pretext" for discriminatory behavior, and may satisfy this requirement by persuading a court that the offered explanation is unworthy of belief.

It should also be noted that in view of possible juror prejudice, Congress did not provide for jury trials under Title VII. According to the *Federal Rules of Civil Procedure* 39(c), a trial court, at its discretion and without explaining why, may summon an advisory panel to assist it in deciding such cases. But the court is free to disregard the jury's findings and a review on appeal is "as if there had been no verdict" from the pannel.[22]

The "Qualified" Employee. "Title VII is designed to eliminate discrimination, it does not require that unqualified persons be hired, retained, or promoted."[23] In fact, under Title VII a media employer may fire a qualified employee to hire an even better one if the employer's behavior is not motivated by animosity toward a protected group or its members.[24] He or she may even fire a well-qualified worker to hire one with questionable qualifications. For example, a radio station owner's desire to employ a male friend with a less-than-outstanding work record could be a legitimate reason for firing a female advertising salesperson with a good work record, if a male also would have been fired to make room for the friend.[25] "The employer may fire an employee for a good reason, a bad reason, . . . or for no reason at all, as long as its action is not for a discriminatory reason."[26] And considerable discretion is allowed an employer in deciding who is a "qualified" person. He or she may, for instance, place more value on work experience than a journalism degree,[27] or vice versa,[28] in making employment decisions.

Race Discrimination

Pretext for Discrimination. Equal Employment Opportunity Commission v. Gaddis[29] provides a good example of someone with a journalism degree who had little apparent difficulty persuading a court that a newspaper defendant violated Title VII.

In that case, an Oklahoma newspaper had sought a photographer to fill a staff vacancy, and a reporter had suggested to the executive editor that his one-time college roommate, a freelance writer and photographer, might be interested. The editor authorized the reporter to phone his friend in California and offer him the job. The friend accepted and when he arrived at the newspaper's office a few weeks later the editor discovered that the photographer was black. According to testimony, the editor told the reporter that the publisher "would never allow a black in the office" or words to that effect. A few days later, the reporter was informed by the editor that the photographer could not continue to work because no vacancy existed and because the editor had no hiring authority. The message was conveyed to the photographer, and, after his departure, the defendant hired two white photographers.

The court concluded that the EEOC had established a prima facie case of race discrimination and that the explanation offered to the photographer and the court might have been legitimate and nondiscriminatory. The question, then, was whether the editor's behavior was a "mere pretext" for discrimination. The court answered this question in the affirmative and awarded the photographer back pay and damages totalling $18,225, plus $6,000 in attorney fees. The publisher had argued that he was not responsible for the actions of the editor, but the court disagreed. It reasoned that the employer was liable "where the action complained of was that of a supervisor, authorized to hire, fire, discipline or promote, or at least to participate in or recommend such actions, even though what the supervisor is said to have done violates company policy." Furthermore, the court found sufficient evidence to support the conclusion that the editor was following company policy and that the publisher "took part in the discriminatory decision."

Nondiscriminatory Conduct. Although the Gaddis court had no apparent difficulty determining that the photographer was qualified for the position, an "absolute or relative lack of qualifications" is a permissible basis for an adverse employment decision under Title VII.[30] In Lowe v. WCAU-TV,[31] a black high school graduate employed as a clerk-typist sought a promotion to press information manager, a position the defendant would fill only with a college graduate. The clerk-typist argued that the degree requirement was designed to exclude her from the job[32] for which she was otherwise qualified. But the court decided that the degree requirement was "reasonable" and that the person selected for the posi-

tion had other qualifications superior to hers. "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins," it concluded. Similarly, in Perry v. CBS [33] a black clerk who sought promotion to a variety of news-related positions (including the news assignment desk) was regarded as relatively unqualified because, as the court noted, "better qualified and more experienced persons applied for the positions."

Serious misconduct on the part of any employee, regardless of race, is also a nondiscriminatory reason for an adverse employment action. A writer for a science magazine who adopted a work week shorter than his employer required,[34] a public information officer who refused to obtain the approval of her superiors before releasing news stories,[35] and an advertising salesman who would not follow new sales procedures[36] were legally discharged despite allegations of race discrimination. On the other hand, Title VII would be violated if a black media employee is fired for such misconduct while a white colleague who engaged in similar misbehavior is retained.[37]

Interracial Associations. It also appears that Title VII is violated if a newsperson is discharged because of his or her interracial associations. In Gutwein v. Easton Publishing Co.,[38] a white reporter for a weekly newspaper was discharged after his employer discovered that he was engaged to a black woman. The reporter brought suit under a state fair employment practices act[39] containing wording identical to that in Title VII. The defendant argued that the reporter was discharged not because of his race but because of his fiancee's, and also maintained that the firing was proper because his failure to adhere to the community's mores and customs "limited or destroyed" his effectiveness as an employee. The trial court agreed, reasoning that "it is not his. . . race. . . but what he is doing that is the crux of the matter." The Court of Appeals of Maryland reversed, ignoring the "mores and customs" argument and concluding that the discharge was because of the plaintiff's race even though his race was white.

The reasoning of the court of appeals is consistent with a decision in a Title VII case, Whitney v. Greater New York Corp.[40] There, a white typist-receptionist alleged she was discharged because of her casual social relationship with a black male. The defendant argued that the firing was premised only on the race of her friend but the court disagreed. It decided that if the discharge was based on the social relationship between a white woman and a black man, "the plaintiff's race was as much a factor in the decision to fire her as (was the race of) her friend."

"Voice" and "Sensitivity" as Job Qualifications. Although a primary focus of Title VII is to "remove barriers that have operated in the past to favor white employees,"[41] its protections extend to whites as well as blacks.[42] It is, for example, illegal under the Civil Rights Act to refuse to

hire a white applicant for a news editor's job because "the position was created for blacks."[43] Gutwein, however, did raise an interesting question. Could the preference of news sources, listeners or viewers etc. for a newsperson of a particular race justify a refusal to hire an applicant not of that race?

In the 1964 Civil Rights Act, Congress specified that "religion, sex, or national origin" could be "a bona fide occupational qualification reasonably necessary to the normal operation" of a business or enterprise.[44] However, race and color specifically were excluded from this "BFOQ" wording. "Race or color can *never* be a bona fide occupational qualification or a reason for differential treatment of any kind.[45] Moreover, the Equal Employment Opportunity Commission and courts have taken the position that an employer cannot discriminate against any individual because of the preferences of co-workers, clients or customers. The alleged preference of a newspaper's advertisers for male salesmen was not a justification for restricting a female to telephone sales work.[46] Neither could the preference of a black community for a black counselor of disadvantaged youth justify discrimination against a white.[47]

A slightly different argument was made in Chaline v. KCOH.,[48] where a white announcer and writer for a black-oriented radio station had been discharged and replaced by a black. The defendant argued that the plaintiff was "not sensitive" to the listening tastes of a black audience and did not have the proper "voice" for the position. The Fifth Circuit Court of Appeals reluctantly assumed that voice and sensitivity might be legitimate job qualifications but found that the proffered reasons for discharge were pretext for race discrimination and awarded the plaintiff $6,000 in back pay. The court noted that Chaline had successfully used a "black voice" in preparing commercial spots for broadcast and that during the course of the trial he had "demonstrated his mastery of voice and idiom." It also concluded that his performance in scripting commercials "indicates an awareness of the tastes and preferences of the KCOH listening audience."

No case involving a similar argument by another media defendant could be found, but cases by analogy may provide some insight into the merits of the defendant's arguments. In Cohen v. Community College,[49] the court avoided the question of whether a black could be preferred to fill a job teaching African art by concluding that the black applicant was more qualified for the position than the white plaintiff, as the defendant had argued. In Avigliano v. Sumitomo Shosi America, Inc.,[50] one court did find that knowledge of the Japanese language could be a bona fide occupational qualification for someone seeking a management-level position with the American subsidiary of a Japanese firm. The same court, however, in Knight v. Nassau County,[51] decided that a black personnel worker could not be limited to minority group recruitment on the basis of the defen-

dant's argument that he had better "rapport" with minorities than a white person might have had.

The assumption that "voice" and "sensitivity" could be legitimate job qualifications, then, seems to rest on shaky ground, at least in the context of a suit alleging race discrimination. The problem with the defendant's argument in Chaline is that it could easily be turned around to justify discrimination against a black by a "white-oriented" radio station. In Detroit Police Officers Association v. Young,[52] the city of Detroit contended that it had an "operational need" to give preference in hiring to black applicants for police positions, and premised one of its arguments on the belief that blacks could "communicate. . . better" with other blacks. In rejecting this argument, a federal district court pointed out: "If the defendant's claim of 'operational need' can be considered as compelling then apparently any all white community, via the police department, could lay claim to such a 'compelling interest' in forming a basis to reject all non whites."

Religious Discrimination

Reasonable Accommodation and Undue Hardship. Although relatively few Title VII cases have raised the issue of religious discrimination,[53] it is an unlawful employment practice to deprive any individual of job opportunities because of that person's religious beliefs, unless an employer cannot "reasonably accommodate. . . an employee's or prospective employee's religious observance or practice without undue hardship."[54] Major concerns, then, have centered around what constitutes reasonable accommodation and undue hardship. Most reported decisions have involved plaintiffs who want to observe a Saturday Sabbath and employers who require Saturday work.

In Reid v. Memphis Publishing Co.,[55] the plaintiff had been offered employment as a newspaper copyreader, but the offer was withdrawn when the employer learned that as a Seventh Day Adventist he refused to work on Saturdays. It was the newspaper's policy to assign new copyreaders to Saturday work, giving preference for weekday assignments to employees with seniority. The defendant argued that to give Reid Saturdays off would create serious morale problems for its nine other copyreaders, one or more of whom might have to be involuntary assigned to take his place. Furthermore, the newspaper argued that it would incur overtime expenses of $77 per Saturday if another employee worked for Reid on that day.

A federal district court concluded that such problems would have been a hardship for the defendant, but not an undue one, and suggested that the plaintiff might have been shifted to the defendant's companion newspaper published in the same building, which did not publish on Sun-

days and did not require Saturday work from copyreaders. The Sixth Circuit Court of Appeals disagreed. It decided that to assign other copyreaders to replace Reid would create serious morale problems, that overtime expenses of $77 per week were not "reasonable" considering a beginning copyreader's salary (in 1967) of $125 per week, and that copyreaders are "specialists. . . not readily interchangeable" between the two newspapers.

The reasoning of the Sixth Circuit seems to be consistent with the U.S. Supreme Court's conclusions in a later case, Trans World Airlines, Inc. v. Hardison.[55] There, an employee refused to work on Saturdays after joining the Worldwide Church of God. A seniority system gave other employees first choice of shifts, and to require others to work on Saturdays would have cost the employer "premium overtime wages," about $50 a month. The Supreme Court decided that "to require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." Moreover, the Court declared that

> it would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the shift and job preferences of some employees. . . in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.

De Minimis Cost and Undue Hardship. There is little guidance on what might constitute "more than a *de minimis* cost" for a media employer, but judging from nonmedia cases it appears that $19 a month in extra expense might not be an undue hardship for most companies[57] while $850 a month in overtime costs might well be too much of a burden.[58] If the employer's only problems in accommodating the religious needs of an employee consist of mild complaints and occasional grumbling from other workers, apparently that is not an undue hardship.[59] One court concluded that a supervisor with no more than 10 subordinates need not be saddled with an inflexible worker in view of the supervisor's scheduling problems.[60] Another decided that an employer lawfully may require an employee to work an occasional Saturday to complete an important project when there is "no reserve of manpower" available and the employee's religion does not preclude Saturday work in the event of an "emergency."[61]

As to reasonable accommodation, an attempt to transfer an employee to another branch of the business so that he may avoid Saturday work is legal as long as the new work site is close to the employee's home,[62] but it may be a violation of Title VII if the transfer involves "a substantial reduction in pay."[63] An exemption from a work assignment contrary to an employee's religious beliefs may have to be granted if the task could be assigned to a co-worker with only minor inconvenience.[64] The Equal Employment Opportunity Commission has taken the position that,

whatever the problem, an employer must attempt some sort of accommodation, inquire as to whether other employees would be willing to make adjustments for the benefit of the religious employee, and document any alleged inability to accommodate.[65]

Discrimination in Favor of Co-Religionists. One other matter deserves a brief discussion. Title VII allows religious organizations to discriminate in favor of co-religionists in their hiring practices.[66] Therefore, they may apply a test of religious affiliation in making employment decisions.

In Feldstein v. *Christian Science Monitor*,[67] a college student was rejected for a reporting position because the defendant only hired Christian Scientists except when no qualified member of the church was available. The plaintiff argued that the *Monitor* is a "highly regarded. . . impartial newspaper. . . secular in nature and content," but the court decided that "the primary purpose of the *Monitor* is a missionary one" and any other purpose of the newspaper is "purely. . . ancillary."

A religious organization, however, may not otherwise discriminate. A female editorial secretary for a church-sponsored magazine who was denied monthly allowances paid to similarly-situated male employees has successfully alleged sex discrimination.[68].

Sex Discrimination

Income Differentials. A major complaint of some female journalists is that they are paid less than similarly-situated male employees. In Di Salvo v. Chamber of Commerce,[69] for example, the plaintiff was a journalism school graduate who had worked as associate editor of *Kansas City Magazine*. After she resigned to accept other employment, the defendant abolished the position of associate editor and hired a male as a "communications specialist" to do the same work at a higher salary. The defendant argued that the male had a greater variety of experience and skills, but the court considered this information immaterial since "the crucial issue is not what skills are possessed, but whether the duties actually performed require or utilize those additional skills." It also regarded as unimportant the fact that the job titles differed, reasoning that the focus should be on "actual job requirements and performance, not on on-job classifications or titles." The court eventually concluded that

> after plaintiff's resignation, defendant offered (her) job at the same salary to three women who refused the offers because the salary was not commensurate with the effort and responsibility required by the job. After meeting with this response, rather than increasing its salary offer to the women applicants, defendant hired a male at a salary $3,800 (per year) higher than plaintiff's to perform substantially the same duties under a new title.

The court found in her favor, and she eventually was awarded over $13,000 in back pay with interest, plus $11,000 in attorney fees.[70]

In a somewhat similar case, Futran v. Ring Radio Co.,[71] a writer and talk show hostess had been offered a starting salary $9,000 per year lower than the amount paid to a male with a comparable job who began work at the same time. When she expressed amazement at how low her starting salary would be, the station's general manager allegedly told her that the salary was "in the same ballpark" as the male's. Moreover, the plaintiff alleged that she was required to prepare promotional materials and maintain company files, tasks not required of her male counterpart, and was fired when she refused to perform such work.

The defendant argued that the male had a greater potential for generating income for the station through "personal endorsements" and also argued that it had to offer a salary "necessary to attract him" to the station. The court disagreed with both arguments and found for the plaintiff. It concluded that if the revenue generated by the male became greater than that generated by the female, "it could explain a difference in raises during the course of employment," but anticipated endorsement revenue could not justify such a "large gap" in starting salaries considering the similar qualifications of the two employees. It also decided that the plaintiff's "inferior bargaining position as a woman" did not justify paying her a lower salary when "much of the difference in salaries can be attributed only to the plaintiff's sex."

If male and female employees are not similarly qualified, salary differentials are permitted. In Craft v. Metromedia, Inc.,[72] a demoted television new program co-anchor had been paid less than her male counterpart, but the court attributed the difference in income to "factors other than sex." It noted that the male co-anchor

> had an education in broadcasting, several years of experience as a news anchor in major television markets prior to coming to Kansas City in 1978, and was well established in the Kansas City market by the time plaintiff arrived in 1981. On the other hand, plaintiff had no formal education in broadcasting, her experience as a news anchor was limited to small television markets, and she was unknown to Kansas City viewers.[73]

Comparable Work. The work the plaintiff is performing or has performed also must be comparable to that of a higher-paid male for such actions to succeed. It is a lawful employment practice under Title VII to apply different standards of compensation "pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production,"[74] or when the plaintiff's work requires less "skill, effort, and responsibility" than that of a male employee.[75]

In Johnson v. Allyn & Bacon, Inc.,[76] a plaintiff who alleged discrimination in salary was not successful when evidence showed that her position as a "basic books" editor was not comparable to higher-paying "series editor" positions. Similarly, in Ammons v. Zia Co.,[77] the plaintiff's suit

failed when evidence showed that her job as a writer was not "substantially equal" to the work done by higher-paid male writers and when similarly-situated male employees received the same or less than she. In another case, Barnes v. Callaghan & Co.,[78] a discharged editor apparently had no complaint concerning her income (she had been paid more than 14 of 24 males in comparable positions). But she alleged discrimination in her supervisor's assignment of secretarial help and office furniture. The court decided that she had not been treated differently because of her sex but only because of a personality conflict with her supervisor. The court dismissed her complaint.

Abusive Treatment. The personality conflict in Barnes suggests an interesting question. Could a media employee who alleges sex-based abusive treatment or "bullying" have a cause of action under Title VII? In one case alleging such treatment, Martin v. Easton Publishing Co.,[79] the court did not rule out this possibility.

The plaintiff in *Martin*, a newspaper reporter, argued that her supervisor had reprimanded her publicly for not furnishing a news story he thought should have been written and had ordered her to do a police report "forgotten" by a reporter to whom it had been assigned. Despite a freezing rain creating dangerous driving conditions, she gathered the information for the police report, then requested a meeting with a company official to complain about her supervisor's actions. The official refused to discuss her grievances and instead "badgered" her for an hour about her attitude. At the end of this alleged tirade, when she told the official she thought she was being "exploited," she was immediately fired and told she was "unsuited for. . . work on this or any other newspaper." In her lawsuit against the company she alleged that she was subjected to "higher standards of subordination" than male news staff members.

The only question before the court was whether the plaintiff had alleged facts sufficient for a class action lawsuit. This question the court answered in the negative, deciding that she had not sufficiently alleged that other females in the defendant's employ had been treated similarly and that the complaint was "uniquely personal to the plaintiff's individual circumstances." Class action standing depends on whether there is a "commonality" of injury and whether the person seeking to represent the class has suffered "characteristic" damage.[80]

Other reported cases, however, indicate that allegations connected with verbal abuse are difficult to prove as a matter of sex (or race) discrimination. Although one court concluded that subjecting an employee to discriminatory "hazing" could be a violation of Title VII,[81] the Civil Rights Act "does not proscribe business practices which result in unequal employment opportunities because of personal, emotional or psychological characteristics that might be common to various employees regardless of their race. . . (or) sex."[82] And "no race, color, religion, sex,

or national origin carries with it a monopoly on sensitivity."[83] So courts may conclude that any verbal abuse an employee receives is due to "personal characteristics other than sex,"[84] or that a supervisor is equally offensive to all employees. In a case involving alleged race discrimination, Bradford v. Sloan Paper Co.,[85] two black plaintiffs argued that their white supervisor forced them to work harder than white employees and even threatened one of them with physical violence. The court concluded that the supervisor's actions were "in large part indefensible and unwarranted" but were not prompted by racial bias. "He was equally offensive to members of both races," it decided.

Sexual Harassment. Another form of abusive treatment, sexual harassment, may well be "the occupational hazard most often faced by working women,"[86] but the only reported case involving a newsperson and a media employer appears to be Walter v. KFGO Radio.[87] The plaintiff, a writer and farm news director, had been discharged after her program received low ratings. She alleged that a condition of her employment had been the tolerance of her supervisor's improper behavior. Specifically, she argued that he had patted her on the buttocks, touched her in the breast area and attempted to seduce her. The court questioned whether these alleged incidents actually occurred. But it decided that if they did occur her salary and other benefits had never been conditioned on a favorable response to a sexual overture,[88] that she had never communicated her displeasure to the supervisor, and that she had "ex post facto seized on these incidents in an attempt to gain reinstatement. . . as a broadcast personality."

But in an unreported case, Morgenheim v. Midnight Sun Broadcasters,[89] a broadcast journalist charged that her supervisor Frenchkissed her against her will, forced her to endure a "passionate" backrub, and told her that "the only way a woman could succeed in broadcasting was to play the game." She alleged she was fired for refusing to cooperate, but she apparently settled out of court with the defendant.[90]

Cases involving nonmedia defendants indicate that a homosexual's harassment of a male employee also could be a Title VII violation,[91] but a bisexual's nondiscriminatory harassment of both males and females apparently would not violate the Civil Rights Act.[92]

Discriminatory Media Recruitment. For some women, the problem has not been low pay or abusive treatment of one kind or another. The problem simply has been getting a foot in a mass medium's door.

In Equal Employment Opportunity Commission v. New York Times Broadcasting Service, Inc.,[93] a female had applied to a television station for a job as either an announcer or newswriter-reporter. She had two master's degrees, one in journalism, but her practical experience was limited to work as a correspondent and photographer in Vietnam, and she had no radio or television background. The station's news director

allegedly told the applicant that he "already had a woman reporter" and did not expect to hire another, but that she should check back in a few weeks to see if there were any openings. When she contacted him again, he informed her that an available position had been filled with a male who had more than 20 years of experience in broadcasting and who had worked on an affiliated radio station. Evidence showed that the television station relied heavily on this radio station as a source of new employees and that few females had been employed by the radio station prior to the commencement of this suit.

The EEOC's complaint charged the defendant with sex discrimination in hiring new announcers and reporters, specifically with "limiting, segregating and classifying employees in a way which deprives. . . females of employment opportunities." The Sixth Circuit Court of Appeals agreed that there was no adequate business justification for the station's "primary reliance upon a discriminatory source of recruitment" and enjoined the practice. Said the court: "Prior broadcasting experience was useful for the positions (but) we do not think this justified defendant's practice of recruiting the majority of its personnel. . . from WREC radio."

The U.S. Supreme Court's reasoning in Griggs v. Duke Power Co.[94] supports the Sixth Circuit's conclusions. In *Griggs* the Court wrestled with the question of whether a "facially neutral" employment practice violates Title VII if it limits the employment opportunities of protected groups, even though there was no discriminatory intent on the part of the employer. The Court decided that to require new employees either to have a high school diploma or to pass a standardized intelligence test discriminated against blacks when the requirements were not related to job performance and when they disqualified blacks at a much higher rate than whites. The Court determined that under the Civil Rights Act "practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo." Therefore, such practices cannot be lawful unless they have an "adequate business justification," that is, are significantly related to job performance.

Few cases have dealt with what employer requirements might be significantly related to job performance in the context of newsroom employment. The requirement of a college degree for an "upper level" editing position was found to be reasonable by one court.[95] Another indicated that a company producing legal publications lawfully could require its editors to be lawyers.[96] Such questions ultimately may concern matters of "qualifications," and courts are likely to defer to the judgments of employers in such situations, in the absence of clearly discriminatory behavior.[97]

Single Sex Hiring. It seems doubtful that a media employer could

restrict the bulk of its hiring to members of one sex on the grounds that a particular sex is "better suited" to provide needed services (e.g., reporting the news).

In Diaz v. Pan American World Airways, Inc.,[98] the defendant attempted to restrict its flight attendant positions to females, arguing that they were better able to perform such duties. The Fifth Circuit Court of Appeals decided that "discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively" and found for the male plaintiff. The court reasoned that the primary function of an airline is to transport passengers from one place to another, not to please those passengers in every possible way. And even though a male cabin attendant might not be as appealing to passengers as a female, the defendant could not discriminate against males on that basis. Arguably, since the primary function of a mass medium is the conveyance of information and ideas, the same reasoning would apply to a television station or similar employer if it attempted to favor one sex over the other.

Subclass Sexism. One the other hand, a media employee could become the victim of "subclass sexism." It appears that under Title VII an employer could give preference to a younger woman over an older one, or prefer the one more physically attractive, arguing that there is no discrimination on the basis of sex but only on the basis of appearance and/or age.[99] In Phillips v. Martin Marietta Corp.,[100] the U.S. Supreme Court did indicate that similarly-situated individuals of either sex could not be discriminated against *vis a vis* members of their own sex unless the same distinctions are made with respect to members of the opposite sex. But even under *Phillips* it could be argued, for example, that if a television station applies the same standards to both sexes, preferring youth over age or a pleasing appearance over a less-pleasing one for on-air news personnel, there would not be a violation of Title VII. A possible avenue of legal complaint in such circumstances is the Age Discrimination in Employment Act[101] discussed below.

Age Discrimination

Personal Appearance. With a few minor exceptions,[102] the prohibitions of the Age Discrimination in Employment Act are in terms identical to those of Title VII, except that "age" is substituted for race, religion etc. The ADEA now protects workers 40 to 70 against all forms of age-based employment discrimination, but an employer may avoid liability if there is a legitimate, nondiscriminatory reason for an adverse employment action.

The number of reported ADEA cases involving media employees has been small,[103] and none could be found dealing with the question of

whether the Act might protect an aging communicator whose personal appearance is not as "pleasing" to a viewing audience as it once might have been. Nevertheless, Brennan v. Reynolds & Co.[104] provides some insight into the problems a plaintiff who alleges such discrimination may confront.

In *Brennan* a receptionist had been fired for habitually being late to work. She brought suit under the ADEA, alleging that the true reason for her discharge was because the company "wanted to hire a younger receptionist." The court concluded that the ADEA allows discharges for "good cause," and the plaintiff's record of tardiness had been amply documented by the defendant's time sheets. Said the court:

> The mere fact that an employer may want to part company with an employee. . . does not per se establish that a subsequent discharge of that employee must be unlawfully discriminatory. If the employee himself obliges his employer by providing a valid independent reason for discharge – i.e., by engaging in conduct for which he would have been discharged anyway – his discharge cannot properly be labeled a pretext and ruled unlawful.

Valid Independent Reasons for Discharge. The question then becomes: What might constitute a "valid, independent reason for discharge" other than chronic tardiness? A few ADEA cases provide some guidance here.

In Combes v Griffin Television, Inc.[105] a male television news anchor had been discharged for "insubordination, declining air performance and conflicts with superiors and other employees." The court considered these reasons for discharge to be "justifiable" under the ADEA although the plaintiff prevailed at trial for reasons not discussed by the court.

In Grant v. Gannett Co.[106] a failure to adjust to the management "style" of a newspaper's new owners was a legitimate reason for the discharge of an older classified advertising manager. The court noted that before the purchase of the newspaper by the defendant the plaintiff had enjoyed "significant autonomy for a long period" but could not adjust to the reasonable demands of his new employers. The plaintiff, the court believed, had a "negative attitude" concerning the company's efforts toward equal employment opportunities for women and minorities, regular performance evaluations and staff meetings.

In a nonmedia case, Brady v. President and Fellows of Harvard College,[107] an applicant for a library position unsuccessfully brought suit for age discrimination. The court concluded that his "poor reputation for accuracy" at his previous work was a legitimate basis for rejecting his application.

A complaining party, on the other hand, may have some success if he or she can show statistical evidence[108] demonstrating a pattern of unwarranted discharge of older employees. In Walter v. KFGO Radio, discussed above under sexual harassment, the plaintiff was 44 years old at the time of her discharge and also complained on age discrimination grounds.

She failed in this allegation as well, but the court did note that statistical evidence indicating the defendant's preference for younger employees would have helped her cause. In this case such evidence was not available. In recent years the defendant had discharged at least three persons over the age of 40, but it also had discharged at least nine persons under that age while hiring at least three people over 40. The nature of broadcasting, the court believed, "dictates a relatively large employee turnover as part and parcel of the station's quest to reach the top of the ratings."

Loss of Mobility and Energy. Another question on which there is little guidance is whether the ADEA could protect an older worker (e.g., beat reporter) whose energy is believed by his employer to be unsatisfactory. In Schultz v. Hickok Manufacturing Co.[109] a sales manager argued that he had been fired because the defendant wanted "younger and newer people" and because he was regarded by his employer as lacking "mobility, energy and enthusiasm." The company maintained that he was discharged because his division's sales record was disappointing. The court found for the employee, concluding that his division's sales record was at least as good as that of the company's other divisions. The court did indicate, however, that an employer who conducts an "elaborate evaluation" of each employee and offers a worker the opportunity for input into the evaluation would be in a better position to document an older employee's shortcomings.[110]

What all this means to the media employee is unclear. It does appear that if an older worker can show that his or her record of productivity matches that of younger employees, a suit under the ADEA might succeed. But how he or she could show a sufficient record of productivity is uncertain. In a sex discrimination case brought under Title VII,[111] the court observed that a reporter's demonstration of volume, either in the number of articles published or in column inches, might not be "a proper or accepted measure of employee efficiency and performance."

Reinstatement of a Successful Plaintiff. In Combes v. Griffin Television, Inc., mentioned above, where a news anchor prevailed for unexplained reasons in his suit under the ADEA, the major question before the court was whether the plaintiff should be reinstated in his position. The plaintiff argued that he and the station's management had worked together harmoniously in the past, but even if undesirable consequences resulted from his reinstatement "such considerations must yield to the employee's right to be free from discrimination." The defendant maintained that management must have the prerogative of evaluating a performer's "air talent" and selecting anchorpeople who would give the "best performance" for viewers.

The court decided that reinstatement "would not be in the best interests of either party." It reasoned that a news anchor has a "unique,

unusual or sensitive" position, and that problems with management and other employees would be inevitable if reinstatement occurred. Moreover, such problems would be "perceivable to the viewing audience" and would be "uniquely detrimental and destructive to both Combes and KWTV as well as to other employees affected." The tribunal also concluded that

> a court should avoid forcing such an employment relationship on either an employer or an employee when the purposes of the ADEA can be given effect through the granting of fair, sufficient and appropriate relief fashioned from other available types of remedies.[112]

Conclusions

To a great extent, the law of equal employment opportunity has developed in a blue collar context, so courts have tended to defer to the judgments of employers when white collar and professional employment disputes are resolved.[113] This tendency is evident in cases involving newsroom personnel. For example, if an employer considers a college degree or prior media experience to be a "business necessity," a court is unlikley to quarrel with such reasoning. In the absence of clearly discriminatory behavior, then, an employee or prospective employee may have a difficult time in an employment discrimination case.

In fact, Title VII may provide little direct help to many minority and female job applicants. An employer need not give preference to minorities and women but may choose among qualified candidates as long as unlawful criteria are not used.

On the other hand, minority and female communicators are benefited in some important respects by Title VII. One obvious benefit is that they cannot legally be paid less than a white male if they are similarly qualified and perform comparable work. And if discriminatory employment criteria lawfully cannot be used, there should be an increased likelihood that employees of all races, religions, etc., eventually will occupy a significant number of influential and responsible positions within the media. But progress may be slow.[114] As one senator remarked during debate concerning the Civil Rights Act:

> It is an unhappy fact that if all. . . discrimination in employment were to cease tomorrow, the legacy of past discrimination, as reflected in inadequate training, economic and cultural deprivation, as well as the seniority rights of the present work force, will be felt for at least a generation.[115]

The media employer, no doubt, is caught in something of a bind. The application of Title VII to "compensation, terms, conditions, or privileges of employment" is a sweeping one, encompassing such conduct as the

assignment of "inferior" office space and sex-based or race-based "bullying." Not only may minority and female job applicants or employees legally complain, but so may white males. The availability of attorney fees to a successful plaintiff and the law's reluctance to award such fees to a successful defendant may encourage the filing of discrimination lawsuits, many of which may be without merit. But unless equal employment opportunity law undergoes a fundamental change, the media and other business concerns will have to bear the burdens of such litigation in view of the strong societal interest in the elimination of discrimination.

NOTES

1. Albert Blaustein & Robert Zangrando, eds., *Civil Rights and the Black American* (New York: Simon & Schuster, 1968), p. 524. President Johnson signed the bill on the same date.

2. EEOC v. Pacific Press Pub. Ass'n, 676 F.2d 1272, 1280 (9th Cir. 1981).

3. 110 Cong. Rec. 7385 (1964).

4. See Vaas, "Title VII: Legislative History," 7 *B.C. Indus. & Com. L. Rev.* 431 (1966).

5. 42 U.S.C. §2000e et seq., as amended by the Equal Employment Opportunity Act of 1972, codified *ibid.*

6. Both full and part-time employees may be counted toward the 15-employee requirement. Musser v. Mountain View Broadcasting, Inc., 578 F. Supp. 229 (E.D. Tenn. 1984).

7. Employers were given one year, until July 2, 1965, to comply with the anti-discrimination provisions of the Civil Rights Act. The first Title VII suits were filed October of that year. See Belton, "Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments," 20 *St. Louis U.L.J.* 225, 229 (1976).

8. 29 U.S.C. §621 *et seq.* Discrimination on the basis of a handicap in violation of the Rehabilitation Act of 1973 (29 U.S.C. §794) is excluded from this paper. It has not been a serious problem for the media, but an occasional case provides some insight into this cause of action. See, for example, Caylor v. Alexander, 29 Fair Empl. Prac. Cas. 727 (M.D. Ala. 1981).

9. See Shoben, "Compound Discrimination: The Interaction of Race and Sex in Employment Discrimination," 55 *N.Y.U.L. Rev.* 793, 800 (1980), and cases cited therein.

10. See, for example, Gutierrez v. Denver Post, Inc., 691 F.2d 945 (10th Cir. 1982).

11. Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

12. As to the powers of the EEOC and the procedures used in the investigation of complaints, see Comment, "The Permissible Scope of Title VII Actions," 8 *Seton Hall L. Rev.* 497 (1977). A succinct discussion of the requirements for filing a lawsuit can be found in Silverman, "Employment Discrimination and Title VII," 1983 *Ann. Surv. Am. L.* 957, 968-71.

13. Seymore v. Reader's Digest Ass'n, 493 F. Supp. 257 (S.D.N.Y. 1980).

14. Futran v. Ring Radio Co., 501 F. Supp. 734 (N.D. Ga. 1980). See also 1973 CCH EEOC Dec. 6015.

15. Crowell v. WBRC Television, 23 Fair Emp. Prac. Cas. 367 (N.D. Ala. 1977).

16. Johnson v. Allyn & Bacon, Inc., 731 F.2d 64, 74 (1st Cir. 1984), indicates that attorney fees are likley to be awarded to a successful defendant only when a suit is clearly "frivolous, unreasonable or without foundation."

17. Jackson v. City of Kileen, 654 F.2d 1181, 1186 (5th Cir. 1981).

18. Crowell v. WBRC Television, *supra* note 15.

19. Schaulis v. CBT/McGraw-Hill, Inc., 496 F. Supp. 666 (N.D. Cal. 1980).

20. Tuck v. McGraw-Hill, Inc., 421 F. Supp. 39 (S.D.N.Y. 1976).

21. Pendleton v. Community Union, 8 Fair Empl. Prac. Cas. 514 (C.D. Cal. 1974).

22. 9 C. Wright & A. Miller, *Federal Practice and Procedure* §2335, p. 127 (1971). The use of an advisory jury in a discrimination case "is not favored. . . and should be restricted. . to the exceptional case where there are peculiar and unique circumstances supporting its use." Moss v. Lane Co., 471 F.2d 853, 855 (4th Cir. 1973).

23. Walter v. KFGO Radio, 518 F. Supp. 1309, 1318 (D.N.D. 1981). The defendant need not show that a person hired was in fact more qualified than a rejected job applicant. It is enough to show that in the defendant's opinion the person hired was more qualified. McFadden v. KSD/KSD-TV, Inc., 511 F. Supp. 241 (E.D. Mo.), *aff'd mem.*, 676 F.2d 703 (8th Cir. 1981).

24. See Haines v. Knight-Ridder Broadcasting Co., 32 Fair Empl. Prac. Cas. 1113 (D.R.I. 1980).

25. See Miller v. WFLI Radio, Inc., 687 F.2d 136 (6th Cir. 1982).

26. Nix v. WLCY Radio, 738 F.2d 1181, 1187 (11th Cir. 1984).

27. See 1983 CCH EEOC Dec. 6478.

28. See 1973 CCH EEOC Dec. 6015.

29. 733 F.2d 1373 (10th Cir. 1984). The EEOC may bring suit in its own name in behalf of an aggrieved party.

30. See Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 n. 44 (1977).

31. 21 Fair Empl. Prac. Cas. 594 (E.D. Pa. 1979).

32. In Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), the Supreme Court indicated that testing and educational requirements are not prohibited by Title VII if they are "significantly related" to job performance. See text accompanying notes 94-97 *infra*.

33. 31 Fair Empl. Prac. Cas. 947 (D.D.C. 1983).

34. Ombu v. Children's Television Workshop, 516 F. Supp. 1055 (S.D.N.Y. 1981). In *Ombu*, the plaintiff alleged both race and sex discrimination. Separate allegations of such misconduct are permissible and may be joined in a single action.

35. Holden v. MCAD, 671 F.2d 30 (1st Cir. 1982).

36. Taylor v. Amaturo Group, Inc., 518 F. Supp. 1331 (E.D. Mo. 1981).

37. See Nix v. WLCY Radio, *supra* note 26. The plaintiff had been fired for "moonlighting" in violation of a company rule.

38. 10 Fair Empl. Prac. Cas. 992 (Md. Cir.), *rev'd*, 272 Md. 563, 325 A.2d 740 (1974), *cert. denied*, 420 U.S. 991 (1975).

39. An action under Title VII is not the only remedy available for alleged employment discrimination. Other possibilities include actions under the Civil Rights Act of 1866, 42 U.S.C. §1981, and/or the Equal Pay Act of 1963, 29 U.S.C. §206(d). But for many plaintiffs a Title VII complaint may be the most direct and specific remedy available. See Whittier & Whittier, "Employment Discrimination: Alternative Remedies to Title VII," 43 *UMKC L. Rev.* 296 (1975).

40. 401 F. Supp. 1363 (S.D.N.Y. 1975).

41. Griggs v. Duke Power Co., *supra* note 32, p. 430.

42. See McDonald v. Sante Fe Transp. Co., 427 U.S. 273, 280 (1976).

43. 1983 CCH EEOC Dec. 6501. Under Executive Order 11,246, firms with government contracts are required to develop affirmative action plans to bring minorities into the workforce in a percentage roughly equal to their availability. A discussion of "goals," "timetables" and related matters under such plans is outside the scope of this paper.

44. See 42 U.S.C. §2000e-2(e) (1).

45. Shoben, *supra* note 9, p. 805 n. 47. Race cannot even be a BFOQ if the director of a play wants to cast an actor to play the role of a black person. In such circumstances, the director could hire a white who has a physical appearance of a black. See Sirota, "Sex Discrimination: Title VII and the Bona Fide Occupational Qualification," 55 *Tex. L. Rev.* 1025 n. 4 (1977).

46. 1973 CCH EEOC Dec. 6296. About the only circumstances where sex is a bona fide occupational qualification involve sexuality as a necessary part of the business (for example, single-sex dating service) or privacy matters (for example, nurse serving female patients).

47. Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179 (7th Cir. 1982).

48. 693 F.2d 477 (5th Cir. 1982). *Chaline* was an action under the Civil Rights Act of 1866, 42 U.S.C. §1981, applicable only to race discrimination. The requirements of a §1981 case are the same as those in a Title VII complaint. See *ibid.*, pp. 479-80.

49. 484 F. Supp. 411 (E.D. Pa. 1980).

50. 638 F.2d 552 (2d Cir. 1981), *rev'd on other grounds*, 457 U.S. 176 (1982).

51. 649 F.2d 157 (2d Cir.), *cert. denied*, 454 U.S. 818 (1981).

52. 446 F. Supp. 979 (E.D. Mich. 1978), *rev'd on other grounds*, 608 F.2d 671 (6th Cir.

1979), cert. denied, 452 U.S. 928 (1981).

53. See Thomas Dunfee, Janice Bellace & Arnold Rose, *Business and its Legal Environment* (Englewood Cliffs, N.J.: Prentice Hall, 1983), p. 446.

54. 42 U.S.C. §2000e(j). As to what constitutes a "religion," see Ingram & Domph, "An Employer's Duty to Accommodate the Religious Beliefs and Practices of an Employee," 87 *Dick. L. Rev.* 21, 25-32 (1982).

55. 369 F. Supp. 684 (W.D. Tenn. 1973), *aff'd in part and rev'd in part*, 521 F.2d 512 (6th Cir. 1975), *cert. denied*, 429 U.S. 964 (1976).

56. 432 U.S. 63 (1977).

57. See Burns v. Southern Pacific Transp. Co., 589 F.2d 403 (6th Cir. 1977), *cert. denied*, 439 U.S. 1072 (1979).

58. See Ward v. Allegheny Ludlum Steel Corp., 560 F.2d 579 (3rd Cir. 1977).

59. See Draper v. United States Pipe & Foundry Co., 527 F.2d 515 (6th Cir. 1976).

60. Johnson v. United States Postal Serv., 497 F.2d 128 (5th Cir. 1974).

61. See Williams v. Southern Union Gas Co., 529 F.2d 483 (10th Cir.), *cert. denied*, 429 U.S. 959 (1976).

62. Drum v. Ware, 7 Fair Empl. Prac. Cas. 289 (W.D.N.C. 1974).

63. Draper v. United States Pipe & Foundry Co., *supra* note 59.

64. See McGinnis v. United States Postal Serv., 24 Fair Empl. Prac. Cas. 999 (N.D. Cal. 1980), where a postal worker refused to distribute draft registration literature.

65. See Case Comment, 22 *N.Y.L.S.L. Rev.* 143, 146 (1976).

66. 42 U.S.C. §2000e-1.

67. 555 F. Supp. 974 (D. Mass. 1983).

68. EEOC v. Pacific Press Pub. Ass'n, *supra* note 2.

69. 416 F. Supp. 844 (W.D. Mo. 1976), *aff'd*, 568 F.2d 593 (8th Cir. 1978).

70. For a case involving a related problem, a female who allegedly worked for lower pay than her male predecessor, see Hoggard v. Guard Pub. Co., 13 Fair Empl. Prac. Cas. 1179 (D. Ore. 1976).

71. *Supra* note 14

72. 572 F. Supp. 868 (W.D. Mo. 1983). See also EEOC v. New York Times Broadcasting Serv., Inc., 542 F.2d 356 (6th Cir. 1976), where the court determined that a salary differential could be based on experience.

73. The plaintiff in *Craft* also argued that, unlike the male co-anchor, she was forced to endure constant criticism of her clothing and makeup. The court indicated that such criticism was justified because whe was indifferent to personal appearance and because an employer may require "different modes of dress and grooming" for male and female employees.

74. 42 U.S.C. §2000e-2(h).

75. *Ibid.*; 29 U.S.C. §206 (d) (1).

76. *Supra* note 16.

77. 448 F.2d 117 (10th Cir. 1971).

78. 559 F.2d 1102 (7th Cir. 1977).

79. 73 F.R.D. 678, *reconsideration denied*, 74 F.R.D. 439 (E.D. Pa. 1977).

80. *Fed. R. Civ. P.* 23(a) (1-4). Compare *Martin* with Bormann v. Long Island Press Pub. Co., 379 F. Supp. 951 (E.D.N.Y. 1974), where class action standing was found.

81. Rucker v. Higher Educ. Aids Bd., *supra* note 47.

82. Rogers v. EEOC, *supra* note 11, p. 246.

83. *Ibid.*

84. See Causey v. Ford Motor Co., 10 Fair Empl. Prac. Cas. 1493 (5th Cir. 1975).

85. 383 F. Supp. 1157 (N.D. Ala. 1974). See also Gilliam v. City of Omaha, 388 F. Supp. 842, 854 (D. Neb.), *aff'd*, 524 F.2d 1013 (8th Cir. 1975), where verbal harassment of both male and female employees was not a Title VII violation.

86. Rasnic, "The Evolvement of an Action for Sexual Harassment Under Title VII," 26 *St. Louis U.L.J.* 875, 893 (1982).

87. *Supra* note 23.

88. Some courts have indicated that if sexual harassment creates an "intimidating, hostile, or offensive working environment" the loss of a tangible job benefit need not be shown to state a cause of action under Title VII. See Comment, "The 'Cruel Trilemma': Sexual Harassment Under Title VII and the Tangible Job Benefit," 20 *Am. Bus. L.J.* 109 (1982).

89. Discussed in Catharine MacKinnon, *Sexual Harassment of Working Women* (New Haven: Yale University Press, 1979), pp. 74-75.

90. *Ibid.*, p. 75.

91. See Wright v. Methodist Youth Serv., 511 F. Supp. 307 (N.D. Ill. 1981).

92. See Williams v. Saxbe, 413 F. Supp. 654, 659 n. 6 (D.D.C. 1976), *vacated on other grounds*, 587 F.2d 1240 (D.C. Cir. 1978).

93. *Supra* note 72.

94. *Supra* note 32.

95. Johnson v. Allyn & Bacon, Inc., *supra* note 16.

96. Blowers v. Lawyers Coop. Pub. Co., 25 Fair Empl. Prac. Cas. 1425 (W.D.N.Y. 1981).

97. See text accompanying notes 23-27 *supra*.

98. 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

99. See Sirota, *supra* note 45, p. 1041 and cases discussed therein.

100. 400 U.S. 542 (1971).

101. 29 U.S.C. §621 *et seq.*

102. For a brief analysis of the similarities and differences of Title VII and the Age Discrimination in Employment Act, see Player, "Title VII Impact Analysis Applied to the Age Discrimination in Employment Act: Is a Transplant Appropriate?," 14 *U. Tol. L. Rev.* 1261, 1263-64 (1983).

103. Furthermore, such cases have focused on the remedies available and not on other substantive issues. See, e.g., Jaffee v. Plough Broadcasting Co., 19 Fair Empl. Prac. Cas. 1194 (D. Md. 1979).

104. 367 F. Supp. 440 (N.D. Ill. 1973).

105. 421 F. Supp. 841 (W.D. Okla. 1976).

106. 538 F. Supp. 686 (D. Del. 1982).

107. 27 Fair Empl. Prac. Cas. 496 (D. Mass. 1980), *aff'd per curiam*, 664 F.2d 10 (1st Cir. 1981), *cert. denied*, 455 U.S. 1027 (1982).

108. As to the use of statistical evidence in Title VII litigation, see Waintroob, "The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level," 21 *Wm. & Mary L. Rev.* 45, 69-98 (1979).

109. 358 F. Supp. 1208 (N.D. Ga. 1973).

110. An example of an evaluation of this kind can be found in Stringfellow v. Monsanto, 320 F. Supp. 1175 (W.D. Ark. 1970).

111. Martin v. Easton Pub. Co., *supra* note 79.

112. Remedies available in an ADEA action generally are the same as those available in a Title VII case.

113. See Waintroob, *supra* note 108.

114. Ethnic minorities do not seem to be well represented, as yet, on American daily newspapers. Only 5.8 percent of newspaper editorial positions are held by blacks, Hispanics, etc., even though ethnic minorities constitute about 20 percent of the U.S. population. Moreover, 97 percent of all newsroom executives are white, and over 60 percent of U.S. dailies have no minority newspersons. Ruth, "Special Report -- Minorities," *Presstime*, Aug. 1984, pp. 14-15. No comparative figures could be found for the years prior to the Civil Rights Act.

115. 110 Cong. Rec. 7386 (1964) (remarks of Sen. Young).

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